Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed February 18, 1977
Jurisdiction Postponed April 25, 1977

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(The Ninth Circuit opinion is "Appendix A" on page 13 of the Jurisdictional Statement, and the District Court opinion is "Appendix B" on page 42 of the Jurisdictional Statement.)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 3921

THE STATE OF MONTANA,

Plaintiff,

vs.

MERRIL CLINE, L. R. BRETZ and SHIRLEY (LANKFORD) CLINE,

Defendants.

INFORMATION

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, comes ROBERT L. WOODAHL, Attorney General of the State of Montana, by and through his Special Assistant Attorneys General, Richard Dzivi and James A. Bascue, and in the name and by the authority of the State of Montana, informs the Court that between the days of January 13, 1973 and February 19, 1974, at Lewis and Clark County, Montana, the above-named defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, committed the offenses of GRAND LARCENY, a felony, as specified in section 94-2701 (1), R. C. M. 1947; OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947; PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947; OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947; and PRESENTING FALSE PROOFS UPON POLICY OF INSURANCE, a felony, as specified in section 94-2202, R. C. M. 1947.

All causes of action set forth hereunder are connected in their commission and are separate offenses of the same class of crimes. The Industrial Accident Board, now the Workmen's Compensation Division of the State of Montana, hereinafter will be referred to as "IAB/WCD".

It is hereby alleged:

COUNT I

That the defendants, Merril Cline and L. R. Bretz, then and there being, then and there willfully, knowingly, wrongfully, unlawfully and feloniously did, with the intent to deprive or defraud IAB/WCD of the State of Montana, on or about and between the dates of January 13, 1973 and February 19, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of GRAND LARCENY, a felony, as specified in section 94-2701 (1), R. C. M. 1947, in that the defendants, Merril Cline and L. R. Bretz, did take from the possession of the IAB/WCD of the State of Montana, the true owners thereof, and obtain from such possession by color or aid of fraudulent and false representation and pretenses, and false tokens or writings, and did secrete, withhold, and appropriate to their own use and the use of persons other than the said IAB/WCD of the State of Montana, true owners thereof, money, personal property, and a certain IAB/WCD warrant or check of a value in excess of $50, to wit: $5,400, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-2701 (1), R. C. M. 1947, GRAND LARCENY, a felony, and against the peace and dignity of the State of Montana.

COUNT II

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in Count I hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, designedly, unlawfully, fraudulently and feloniously, by false or fraudulent representation and pretense, on or about and between January 13, 1974 and February 19, 1974, in the County of Lewis and Cark, State of Montana, commit the crime of OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz did fraudulently obtain the possession of money, property and evidence of indebtedness from IAB/WCD in the nature of a certain IAB/WCD warrant or check, and the cash money proceeds thereof, of a value in excess of $50, to wit: $5,400, by preparing, signing and having prepared and executed, and submitting to the IAB/WCD documents alleging that decedent Wesley V. Wampole was an employee of Courtesy Mobil Home Transporting, Inc., and that the said decedent, Wesley V. Wampole, suffered an injury while in the scope of his above-mentioned employment which resulted in his death on or about January 11, 1973; that the said defendants knew the documents to be false in that the decedent, Wesley V. Wampole, was never an employee of Courtesy Mobil Home Transporting, Inc., and, further, that the decedent did not suffer an alleged injury while in the scope of his alleged employment by Courtesy Mobil Home Transporting, Inc., on January 8,

1973; that the IAB/WCD and authorized representatives thereof believed and relied upon such representations and pretenses as true, and hence settled said claim on February 19, 1974, believing that the decedent had been injured in the scope of his employment by Courtesy Mobil Home Transporting, Inc., and thus paid a settlement amount in the sum of $5,400 on February 19, 1974, and forwarded said IAB/WCD warrant or check to the defendants, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1805, OBTAINING MONEY BY FALSE PRETENSES, a felony, and against the peace and dignity of the State of Montana.

COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, frauduently and feloniously, on or about the dates of February 5, 1973 until February 13, 1973, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Claim for Compensation by Beneficiary in Case of Death" dated February 5, 1973 and received at IAB/WCD on February 13, 1973, with the intent to allow said papers, records, in-

struments in writing to be produced as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, deceased, knowing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT IV

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about February 5, 1973 and February 13, 1973, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence a "Claim for Compensation by Beneficiary in Case of Death" as genuine

and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobile Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1701, R. C. M. 1947, OFFERING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT V

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or between the dates of March 19, 1973 until March 22, 1973, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Employer's First Report of Occupational Injury or Disease" dated March 19, 1973, and received at IAB/WCD on March 22, 1973, with the intent to allow said papers, records, instruments in writing to be produced as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, know-

ing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VI

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about March 19, 1973 and March 22, 1973, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence an "Employer's First Report of Occupational Injury or Disease" as genuine and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobil Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1707, R. C. M. 1947, OFFERING FALSE

EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VII

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or about the dates of January 30, 1974 until February 1, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Petition for Compromise Settlement" dated January 30, 1974, and received at IAB/WCD on February 1, 1974, with the intent to allow said papers, records, instruments in writing as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, knowing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section

94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VIII

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about January 30, 1974 and February 1, 1974, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence a "Petition for Compromise Settlement" as genuine and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobile Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1701, R. C. M. 1947, OFFERING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT IX

For a further and separate cause of action, being a different offense of the same class of crimes and offenses, and connected in its commission with the charges set forth

in all preceding counts hereof, the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or between the dates of January 13, 1973 and February 19, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of PRESENTING FALSE PROOFS UPON POLICY OF INSURANCE, a felony, as specified in section 94-2202, R. C. M. 1947, in that the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline did present or cause to be presented a false or fraudulent claim and did submit false or fraudulent proof in support of such claim, to wit: Claim number 58-5489, for an alleged fatal injury sustained by Wesley V. Wampole on January 8, 1973, which said claim and proof falsely and fraudulently alleged that on January 8, 1973, Wesley V. Wampole suffered an injury while in the scope of his employment for Courtesy Mobil Home Transporting, Inc., which resulted in his death on January 11, 1973; submitted upon a contract of insurance between the said IAB/WCD and Courtesy Mobil Home Transporting, Inc., for the payment of a loss covered by the aforementioned insurance contract, and that by so doing the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-2202, R. C. M. 1947, PRESENTING FALSE PROOFS UPON

POLICY OF INSURANCE, a felony, and against the peace and dignity of the State of Montana.

DATED this 31st day of October, 1974.

ROBERT L. WOODAHL

Attorney General for
the State of Montana

By /s/ Richard Dzivi
Special Assistant Attorney General

and /s/ James A. Bascue
Special Assistant Attorney General

NAMES OF WITNESSES FOR
THE STATE OF MONTANA:

Nona Wampole	Harold Eugene Stubbs
Marjorie Stubbs	Richard Wesley Roane
William Koolhof	Hazel Evelyn Roane
Robert Coate	William Burnett
Gene Brennan	Larry Zanto
Marge Mothershead	Lyle Parker
Robert Lund	Sharlo McGehee
Don Mitchell	Guy Marble
Dr. Charles Magner	A. G. "Bud" Pillen
Margaret Condon	Pete Strizich
Morris L. Brusett	Jerry Smith
Terry Whitaker	Kingsbury N. Conner

Representative of the IAB/WCD

Representative of Environmental Development Corporation

Representative of Secretary of State for the State of Montana

Representative of Public Service Commission

Representative of Legislative Auditor, State of Montana

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 3963

THE STATE OF MONTANA,

Plaintiff,

vs.

MERRIL J. CLINE, L. R. BRETZ and SHIRLEY (LANKFORD) CLINE,

Defendants.

INFORMATION

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, comes ROBERT L. WOODAHL, Attorney General of the State of Montana, by and through his Special Assistant Attorneys General, Richard Dzivi and Al Wells, and in the name and by the authority of the State of Montana, informs the Court that between the days of January 11, 1973 and February 20, 1974, at Lewis and Clark County, Montana, the above-named defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, committed the offenses of GRAND LARCENY, a felony, as specified in section 94-2701(1), R. C. M. 1947; and OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947.

That essential elements of both counts of this Information occurred during calendar year 1973, thus bringing

this Information within the savings clause provisions of Section 33 of Chapter 513, *Laws of Montana 1973.*

The counts set forth hereunder are alternative offenses arising from the same transaction.

The Industrial Accident Board, now the Workmen's Compensation Division of the Department of Labor and Industry of the State of Montana, hereinafter will be referred to as "IAB/WCD".

It is hereby alleged:

COUNT I

That the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there willfully, knowingly, wrongfully, unlawfully and feloniously did, with the intent to deprive or defraud IAB/WCD of the State of Montana, on or about and between the dates of January 11, 1973 and February 20, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of GRAND LARCENY, a felony, as specified in section 94-2701(1), R. C. M. 1947, in that the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, did take from the possession of the IAB/WCD of the State of Montana, the true owners thereof, and obtain from such possession by color or aid of fraudulent and false representation and pretenses, and false tokens or writings, in that the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, did falsely represent that Wesley Wampole was employed by Courtesy Mobile Home Transporting, Inc., on January 8, 1973, and that during the course and scope of his employment on January 8, 1973, suffered an injury which resulted in his death on January 11, 1973,

and did secrete, withhold, and appropriate to their own use and the use of persons other than the said IAB/WCD of the State of Montana, true owners thereof, money, personal property, and a certain IAB/WCD warrant or check of a value in excess of $50, to wit: $5,400, and that by so doing the defendant, Merrill Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-2701(1), R. C. M. 1947, GRAND LARCENY, a felony, and against the peace and dignity of the State of Montana; an essential element of this offense occurred, between said dates, in calendar year 1973.

COUNT II

As an alternative offense arising from the same transaction, the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there did willfully, knowingly, wrongfully, designedly, unlawfully, fraudulently and feloniously, by false or fraudulent representation and pretense, on or about and between January 11, 1973 and February 20, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947, in that the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline did fraudulently obtain money, property and evidence of indebtedness from IAB/WCD in the nature of a certain IAB/WCD warrant or check, and the cash money proceeds thereof, of a value in excess of $50, to wit: $5,400, by preparing, signing and having prepared and executed, and submitting to the IAB/WCD documents alleging that decedent Wesley V. Wampole was an employee of Courtesy Mobile Home Transporting, Inc., and that the said decedent, Wesley V. Wampole, suffered an injury while in the scope of his above-mentioned employ-

ment which resulted in his death on or about January 11, 1973; that the said defendants knew the documents to be false in that the decedent, Wesley V. Wampole, was never an employee of Courtesy Mobile Home Transporting, Inc., and, further, that the decedent did not suffer an alleged injury while in the scope of his alleged employment by Courtesy Mobile Home Transporting, Inc., on January 8, 1973; that the IAB/WCD and authorized representatives thereof believed and relied upon such representations and pretenses as true, and hence settled said claim on February 19, 1974, believing that the decedent had been injured in the scope of his employment by Courtesy Mobile Home Transporting, Inc., and thus paid a settlement amount in the sum of $5,400 on February 19, 1974, and forwarded said IAB/WCD warrant or check to the defendants, and that by so doing the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-1805, OBTAINING MONEY BY FALSE PRETENSES, a felony, and against the peace and dignity of the State of Montana; an essential element of this offense occurred, between said dates, in calendar year 1973.

DATED this 4th day of April, 1975.

ROBERT L. WOODAHL
Attorney General of Montana

By /s/ Richard Dzivi
Special Assistant Attorney General

and /s/ Al Wells
Special Assistant Attorney General

Office of the Attorney General
State Capitol
Helena, Montana 59601

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV 75-113-Blg

L. R. BRETZ,

Petitioner,

vs.

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and JOHN MOE, as Sheriff of Missoula County, Montana,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, L. R. BRETZ, moves the United States District Court For The District of Montana, Billings Division, to set a show cause hearing and order Respondents Roger Crist, as Warden of the Montana State Penitentiary, and John Moe, as Sheriff of Missoula County, Montana, to appear, and show cause why this Court should not issue a Writ of Habeas Corpus releasing Petitioner from their custody. In support of this motion, petitioner alleges:

1. Bretz is being illegally confined and restrained of his liberty at the Missoula County Jail, Missoula, Montana, by respondents, Roger Crist, as Warden of the Montana State Penitentiary, and John Moe, as Sheriff of Missoula County, Montana, under a Judgment of Conviction and Sentence by the District Court, Lewis and Clark County, Montana, in Criminal Cause No. 3963.

2. The Court proceedings which resulted in this illegal confinement and restraint are set forth in an Appendix which will be filed in support of this petition

within five days, the time required to obtain the same from the respective Courts involved. This Appendix is made a part of this petition here. These proceedings are:

A. Nine count information in Criminal Cause No. 3921, against Bretz and others, filed on October 3, 1974.

B. Court Minutes in No. 3921, showing that both the State and Bretz appeared for trial, and announced that they were ready for trial on March 10, 1975.

C. Court Minutes in Criminal Cause No. 3921 showing that a jury was empanelled and sworn to try No. 3920 on March 13, 1975.

D. State's Motion to Dismiss No. 3921, filed April 4, 1975.

E. Order granting State's Motion to Dismiss Information No. 3921, filed April 4, 1975.

F. A second three count Information filed as Criminal Cause No. 3963, against Bretz and others, filed April 4, 1975.

G. Bretz's Motion to Dismiss the No. 3963 because of Double Jeopardy, filed April 25, 1975.

H. Minute entry of District Court Order denying Motion to Dismiss because of Double Jeopardy, filed May 1, 1975.

I. Decision of Montana Supreme Court in State v. Cunningham (decided May 2, 1975) 32 St. Rep. 433, — M —, 535 P. 2d 186.

J. Decision of Montana Supreme Court in State v. Cunningham denying Petition for Rehearing (decided May 20, 1975).

K. Judgment of Bretz Conviction and fourteen year sentence, filed July 14, 1975.

L. Decision of Montana Supreme Court in Bretz v. Sheriff (decided July 23, 1975) 32 St. Rep. 762, — M. —, — P. 2d —.

M. Decision of Montana Supreme Court in Bretz v. Sheriff denying Petition for Rehearing (decided September 2, 1975).

3. As shown by these proceedings, Bretz was first charged by a nine count Information in No. 3921. He fully prepared for trial and a jury was empanelled and sworn to try him on his "not guilty" plea. No witnesses had been sworn or testified when the Court granted the State's Motion to Dismiss No. 3921. The State then charged Bretz with a new three count Information in No. 3963. These three counts in No. 3963 were the same as three of the nine counts charged against him in No. 3921. Bretz moved to dismiss, claiming double jeopardy. The trial court overruled Bretz's Motion to Dismiss because of double jeopardy. The Montana Supreme Court in the Cunningham decision upheld the validity of the Montana Statute, 95-1711, R. C. M. 1947 which states that jeopardy does not attach until after the first witness is sworn and testifies, as against the contention that under the Montana and United States Constitutions, jeopardy attaches when the jury is empanelled and sworn.

4. Bretz was then tried, convicted and imprisoned on one count in No. 3963, which was the same as one of the counts previously dismissed in No. 3921. Bretz's Petition for Habeas Corpus relief from the Montana Supreme

Court, on double jeopardy grounds, was denied by that Court, which reaffirmed its decision in Cunningham. This Court denied Bretz's Petition for Rehearing.

5. Jeopardy attached in Cause No. 3921 when the jury was empanelled and sworn to try that case, and Bretz's confinement and restraint under his conviction and sentence in No. 3963 violates the double jeopardy provisions of the Montana and United States Constitutions. Montana Statute 85-1711, defining when jeopardy attaches, is unconstitutional.

6. A Petition for a similar Writ of Habeas Corpus has been presented to The United States District Court For The District of Montana, Butte Division on behalf of Merril Cline, who was a codefendant with Bretz in both causes 3921 and 3963. This raises the same issue as to the constitutionality of Montana Statute 85-1711. A Petition for a similar Writ of Habeas Corpus has also been filed with this Court on behalf of Clancy Cunningham, as Cause No. _____ which raises this same legal issue. Counsel for all these parties have agreed that because this same issue is involved in all three cases, that such three cases should be joined for the purpose of briefing and arguing this constitutional issue.

WHEREFORE, Petitioner requests that this Court set a hearing on this Petition and order that the Respondents appear at such hearing, answer the allegations of this Petition, and show cause, if any they have, why this Petition for a Writ of Habeas Corpus should not be granted. Petitioner further requests that the Petitions of Merril

Cline and Clancy Cunningham be joined with this cause for the purpose of briefing and arguing the same constitutional issue presented in all three Petitions.

DATED October 24, 1975.

MOSES, KAMPFE, TOLLIVER
& WRIGHT

P. O. Box 1913
Billings, Montana 59103

By /s/ Charles F. Moses
Attorneys for Petitioner

State of Montana, County of Yellowstone: ss

CHARLES F. MOSES, of legal age, being first duly sworn, upon his oath, deposes and says that he is the attorney for the Petitioner herein, and verifies this Petition on his behalf for the reason that Petitioner is not now present in Yellowstone County, Montana, that he has read this Petition, and the facts stated therein are true.

/s/ Charles F. Moses

SUBSCRIBED and SWORN to before me this 24th day of October, 1975.

/s/ Kathleen M. Kastelitz

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission Expires April 15, 1978

(SEAL)

No. 12846

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1975

THE STATE OF MONTANA,
Plaintiff and Appellant,
vs.
CLANCY CUNNINGHAM,
Defendant and Respondent.

Appeal from: District Court of the Thirteenth Judicial District,

Honorable Robert H. Wilson, Judge presiding.

Counsel of Record:

For Appellant:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana

Richard Dzivi argued, Special Assistant Attorney General, Great Falls, Montana

Harold F. Hanser, County Attorney, Billings, Montana

For Respondent:

Moses, Kampfe, Tolliver and Wright, Billings, Montana

Ralph Wright argued, Billings, Montana

Submitted: April 14, 1975
Decided: May 2, 1975

Filed: May 2, 1975

Thomas J. Kearney, Clerk

ATTEST: A true copy

Richard T. Conboy,
Deputy Clerk of Supreme
Court, Helena, Montana

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

The question in this case is whether further prosecution is barred by the double jeopardy provisions of the United States and Montana Constitutions. The district court held it was. We reverse.

On August 24, 1973, defendant Clancy Cunningham was charged with first degree assault arising out of the alleged stabbing of one Larry Catlin. Defendant entered a plea of "not guilty". The case was set for trial on March 21, 1974, in the district court of Yellowstone County.

On the trial date, a jury was duly selected and sworn. The district judge then read a general omnibus jury instruction without objection. Court was then recessed over the noon hour.

When court reconvened, the deputy county attorney moved to dismiss the action on the ground that a new and different charge, specifically third degree assault, was being filed against the defendant in justice court. The substantial reason for the dismissal was that the victim of the alleged assault was not available to testify. The victim, a resident of Wyoming, had not been subpoenaed. The state's motion to dismiss was granted without objection.

Defendant entered a plea of "guilty" to the third degree assault charge based on the same incident. He was sentenced in the justice court to six months in the county jail.

Thereafter on May 17, 1974, defendant, represented by different counsel, withdrew his prior plea of "guilty" and entered a plea of "not guilty" to the third degree assault

charge in the justice court. Thereupon the state dismissed the third degree assault charge and filed a first degree assault charge based on the same incident in the district court.

Defendant moved to quash the latter charge on the ground that it placed defendant in jeopardy a second time on the same charge in violation of the double jeopardy provisions of the federal and state constitutions. Affidavits were filed by the deputy county attorney, a paralegal officer of the county attorney's staff, and the victim. These affidavits are somewhat at variance concerning what prior arrangements had been made for the victim to testify and why he did not appear to testify on March 21 on the former charge of first degree assault against defendant.

After hearing, the district court granted defendant's motion to quash. The state appeals.

The Fifth Amendment's prohibition against placing a person twice in jeopardy for the same offense applies to state court criminal proceedings through the "due process" clause of the Fourteenth Amendment. Benton v. Maryland, (1969) 395 U. S. 784, 89 S. Ct. 2056, 23 L. ed. 2d 707. This proscription is not only against being twice punished, but also against being twice put in jeopardy. United States v. Ball, (1896) 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300; United States v. Jorn, (1971) 400 U. S. 470, 91 S. Ct. 547, 27 L. ed. 2d 543. It thus becomes necessary to determine when jeopardy attaches in a Montana state court criminal prosecution.

Montana statutes provide that jeopardy attaches in a criminal trial after the first witness is sworn. The 1969 Montana legislature so provided in Ch. 228, Session Laws

of 1969, codified as section 94-6808.3, R. C. M. 1947. This Montana statute was derived from the Model Penal Code. § 1.08, Model Penal Code, Proposed Official Draft, 1962. The American Law Institute, in formulating this portion of the Model Penal Code, determined that jeopardy customarily attaches in nonjury cases upon swearing the first witness (see Anno. 49 A. L. R. 3d 1039); and concluded that no valid rationale exists for jeopardy attaching at a different time in a jury trial. The Montana legislature in 1969 adopted this standard of when jeopardy attaches.

The 1973 Montana legislature, meeting after adoption of the 1972 Montana Constitution, again considered this state's criminal statutes on former prosecutions and double jeopardy. This legislature re-enacted section 94-6808.3, R. C. M. 1947, providing that jeopardy attaches in a criminal trial after the first witness is sworn. Section 95-1711, R. C. M. 1947.

The federal rule, unlike the Montana statute, provides that in criminal trials in the federal courts jeopardy attaches when the jury is selected and sworn. Downum v. United States, (1963) 372 U. S. 734, 83 S. Ct. 1033, 10 L. ed. 2d 100. Whether the source of this rule lies in the rule making power of the United States Supreme Court over federal court proceedings or constitutes a pronouncement of double jeopardy standards of the United States Constitution is unclear.

Thus the constitutionality of the Montana statute providing that jeopardy attaches when the first witness is sworn is squarely presented.

Defendant contends the Montana statute is unconstitutional because it violates the double jeopardy standards

of the United States Constitution as enunciated in a series of United States Supreme Court decisions, principally Downum v. United States, (1963) supra; Duncan v. Louisiana, (1968) 391 U. S. 145, 88 S. Ct. 1444, 20 L. ed. 2d 1412; Illinois v. Somerville, (1973) 410 U. S. 458, 93 S. Ct. 1066, 35 L. ed. 2d 425, 433, 434, and Serfass v. United States, (1975) — U. S. —, 43 L. ed. 2d 265, 95 S. Ct. —. Although there is language in these opinions that supports this conclusion, the facts and issues in these cases do not in our opinion set up a rigid, immutable constitutional rule to be applied mechanically in determining whether state laws conform. Although constitutional opinions of the United States Supreme Court are necessarily painted with a broad brush, the language cannot be interpreted in a factual vacuum. As the United States Supreme Court observed in *Somerville* in commenting on its holding in a prior case:

> "While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings."

Each of the cases noted in the preceding paragraph on which the defendant relies is clearly distinguishable from the instant case and does not present the issue with which we are here confronted. *Downum* involved a trial in federal court where jeopardy had clearly attached under the federal rule. *Duncan* involved the right to trial by jury, not double jeopardy. *Somerville* involved a state criminal trial where jeopardy had clearly attached under a state statute providing that jeopardy attached when the former prosecution was "terminated *improperly* after the jury was impaneled and sworn", the federal rule. (For the text of the statute see People v. Somerville, 88 Ill. App.

2d 212, 232 N. E. 2d 115). *Serfass* involves a prosecution in federal court where the indictment was dismissed by pretrial order and defendant had not yet been put to trial before the trier of the facts.

Our inquiry here focuses on whether the federal rule is of constitutional dimensions precluding state legislation on the subject. Or stated another way, is the federal rule so fundamental to the American system of justice that the "due process" clause of the Fourteenth Amendment mandates its application to state court criminal proceedings?

We perceive no inherent merit in the federal rule over Montana's state law. It has been said the federal rule is designed to prevent prosecutorial manipulation. Illinois v. Somerville, supra. It has further been said that the federal rule guarantees the defendant his valued right to have his trial completed before the tribunal and jury selected for his case. Wade v. Hunter, (1949) 336 U. S. 684, 93 L. Ed. 975; United States v. Jorn, supra.

We fail to see in what manner the federal rule protects against these abuses to a greater extent than Montana law. Prosecutorial manipulation can be effected as readily under one rule as under the other. If bent on manipulation, a federal prosecutor can move to dismiss after the jury is selected but before it is sworn, as readily as a state prosecutor can move to dismiss after the jury is sworn but before the first witness is called. In either case, the real protection against prosecutorial manipulation is the discretion of the trial judge in granting or denying dismissal. Here, for example, the judge could have, but did not dismiss with prejudice.

Nor do we see any greater protection in the federal rule as far as securing to defendant the right to have his trial completed before the court and jury selected to try his case. Montana adheres to this principle also. It all depends on when the trial is considered to have commenced—whether on selection and swearing of the jury as in the federal courts, or on swearing the first witness as in Montana state courts.

We find no substantial difference between the two rules. Montana policy as enunciated by its legislature is that the trial does not start until the first witness is sworn. Sound policy reasons exist for this rule, principally that the jury as the trier of the facts has nothing to consider until the first witness is called and sworn. This appears entirely consistent with the constitutional standard that jeopardy does not attach until the defendant has been put to trial before the trier of the facts. Serfass v. United States (1975), supra. And as the United States Supreme Court observed in *Somerville:*

> "Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy."

For these reasons, we conclude that the Montana statute does not violate United States constitutional standards of double jeopardy. Neither does the statute violate the double jeopardy provision of the 1972 Montana Constitution, Art. II, Section 25. This provision does not define when jeopardy attaches leaving the legislature free to make that determination. The legislature has done so by enactment of the statutes heretofore noted. In so

doing it has nullified any suggestion found in the language of State v. Gaimos, (1916) 53 Mont. 118, 162 P. 596, that jeopardy attaches upon impaneling and swearing the jury.

This cause is remanded to the district court of Yellowstone County for further proceedings.

/s/ Frank I. Haswell
Justice

We concur:

/s/ James T. Harrison
Chief Justice

/s/ Wesley Castles

/s/ John Conway Harrison

/s/ Gene B. Daley

Justices

The Ninth Circuit opinion is "Appendix A" on page 13 of the Jurisdictional Statement, and the District Court opinion is "Appendix B" on page 42 of the Jurisdictional Statement.